IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 5608 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE KS JHAVERI

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VILASBEN D/O SAVJIBHAI GANESHBHAI VIRADIYA AND W/O & 1 - Applicant(s)
Versus
THE STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :

MR BM MANGUKIYA for Applicant(s) : 1 - 2.MS BELA A PRAJAPATI for Applicant(s) : 1,
MR PD BHATE PUBLIC PROSECUTOR for Respondent(s) : 1,
MR RS SANJANWALA for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE KS JHAVERI

Date : 15/03/2007

ORAL JUDGMENT

1.0 By way of this application, the applicants have prayed to quash and set aside the complaint being I-C.R. No. 125 of 2003 registered with Kapodra Police Station.

2.0 The brief facts of the case are that on 25th April, 2003 the father of applicant no. 1 herein – respondent no. 2 filed the complaint in question against applicant no. 2 and his father

inter alia alleging that applicant no. 2, by luring applicant no. 1 that he would marry her, took away applicant no. 1 from his custody, though applicant no. 1, at the relevant point of time, was a minor. It is the case of the applicants that applicant no. 1 was never lured or forcefully taken into custody by applicant no. 2 and that she had accompanied applicant no. 2 at her own wish and will.

2.1 Thereafter, on 17th October, 2005 the applicants got married. On 15th May, 2006 applicant no. 2 came to be arrested by the Investigating Officer and on that day, an application was moved by the Investigating Officer before the learned Magistrate for inclusion of Section 376 of IPC in the FIR which was allowed by the learned Magistrate. In pursuance to that applicant no. 1 preferred an application before the Sessions Court at Surat for the release of applicant no. 2 on bail. The said application was dismissed by the learned Principal Sessions Judge, Surat vide order dated

22nd May 2006. In pursuance to the above, being aggrieved by the impugned complaint filed against applicant No. 2 and his father, the applicants have approached this Court by way of this application.

3.0 Learned Advocate for the applicants has submitted that since applicant No.1 had voluntarily left her parental home at her own wish and will, with a view to marry applicant No.2, no offence as alleged has been committed by applicant No.2.

3.1 In support of the same, learned Advocate has placed reliance on a decision of the Apex Court in the case of ***"S. Varadarajan Vs. State of Madra"*** reported in AIR 1965 SC 942 wherein in Para-7 it has been held as under,

> **"7.** But, when the girl (who though a minor had attained the age of discretion and is on the verge of attaining majority and is a senior college student) from the house of the relative of the father where she is kept, herself telephones the accused to meet her at a certain place, and goes

> there to meet him and fining him waiting with his car gets into that car of her own accord, and the accused takes her to various places and ultimately to the Sub-Registrar's Office where they get an agreement to marry registered, and there is no suggestion that this was done by force or blandishment or anything like that on the part of the accused but it is clear from the evidence that the insistence of marriage came from her side, the accused by complying with her wishes can by no stretch of imagination be said to have “taken” her out of the keeping of her lawful guardianship, that is, the father. The fact of her accompanying the accused all along is quite consistent with her own desire to be the wife of the accused in which the desire of accompanying him wherever he went is of course implicit. Under these circumstances no inference can be drawn that the accused is guilty of taking away the girl out of the keeping of her father. She has willingly accompanied him and the law does not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him.”

3.2 Learned Advocate has further submitted that since applicant No.1 was neither threatened nor lured by applicant No.2 to leave her parental home and that she has left her home at her own wish and will, the impugned complaint deserves to be quashed and set aside.

3.3 In support of the same, learned Advocate

for the applicants has placed reliance on an unreported decision of this Court passed in Criminal Misc. Application No.279 of 1991 decided on 05.03.1991 wherein this Court held as under,

> "Now, on the date of incident, she was no longer with her father but would certainly be under the guardianship of her brother, the complainant. Assuming that by custody we do not meant the actual physical custody and therefore, constructive custody still remained with her father though she was with her relatives or her friends at that village Davat. She did accompany her brother in the Bazar of Karjan and from there on her own she left the company saying that she wants to visit her friends, which ultimately, according to the complainant turns out to be a trick.
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> Now, if it be a trick, from the complainant it cannot be said that this trick has been played by the said accused and the girl herself has offered this to be an excused and has left the company of her brother. Thereafter, as stated above, the marriage has taken place and as a wife of the said accused, the petitioner has moved the present petition for quashing the said complaint. Taking the aforesaid requirement of Sec.361 when the complaint itself does not disclose any factual date to make out any of the ingredients of either the victim having been taken or enticed away, to my mind, the submission of the learned Advocate Shri Patel as to the missing of the ingredients of the offence has to be accepted. Once this is done, it is quite clear that the complaint

is required to be quashed."

3.4 Learned Advocate has further placed reliance on another unreported decision of this Court passed in Criminal Misc. Application No.6264 of 2004 decided on 07.03.2005 wherein similar principle has been followed by this Court.

3.5 Learned Advocate has further submitted that since applicant No.1 and No.2 have already got married and that they have been living happily together until the arrest of applicant no. 2, the impugned complaint deserves to be quashed and set aside.

3.6 In support of the same, learned Advocate has placed reliance on a decision of the Apex Court in the case of ***"Madhavrao Jiwajirao Scindia and Another Vs. Sambhajirao Chandrojirao Angre and Ors."*** reported in (1988)1 SCC 692 wherein in Para-7 and 8 it has been held as under,

> “**7**. When a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence, it is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.
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> **8.** Though a case of breach of trust may be both a civil wrong and a criminal offence but there would be certain situations where it would predominantly be a civil wrong and may or may not amount to a criminal offence...”

4.0 Heard learned counsel for the parties. From the record, it appears that when respondent No.2 approached the father of applicant No.2 in order to enquire about the whereabouts of applicant No.1, the father of applicant No.2 informed respondent No.2 that he would hand-over custody of applicant no. 1 to him within a day or

two after making necessary enquiry about the whereabouts of applicant no. 1. However, when no intimation was received from the father of applicant no. 2, respondent No.2 again approached the father of applicant No.2. At that time, the father of applicant No.2 informed respondent no. 2 that applicant no. 1 was with applicant no. 2 and that he will not get back the custody of applicant no. 1.

4.1 It may be noted that after commission of the alleged offence, the whereabouts of the applicants were not known, until the arrest of applicant No.2 on 15th May, 2006. In the impugned complaint, it has been alleged that the father of applicant no. 2 had informed respondent no. 2 that he would hand-over possession of applicant no. 1 to respondent no. 2 within a day or two, after conducting necessary enquiry about their whereabouts. The powers of this Court under Section 482 of the Cr.P.C. has to be exercised sparingly and with circumspection. The Court while dealing with an application under Section

482 of the Cr.P.C. is supposed to see and appreciate whether (i) Where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused, (ii) Where the allegations made in the F.I.R. or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach to a just conclusion that there is sufficient ground for proceeding against the accused and (iii) where a criminal proceeding is manifestly attended with mala fide and / or where the proceedings is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

4.2 On a plain reading of the impugned complaint, prima facie, the allegations made therein could not be ruled out or rejected in its entirety. The fact as to whether the father of applicant No.2 was having knowledge about the

whereabouts of applicants at the time of the so-called kidnapping of applicant no. 1 is a matter which requires necessary investigation.

4.3 As regards the aspect of marriage between applicant Nos. 1 and 2 is concerned, it may be noted that the offence took place on 15.04.2003 whereas, the marriage between applicant Nos. 1 and 2 took place on 17.10.2005, i.e. after a period of almost about two and a half years from the date of incident. From the document at Annexure-B to the application, it is evident that the date of birth of applicant No. 1 is 10.10.1987 meaning thereby, that at the time of commission of the alleged offence, the applicant No.1 was a minor. Therefore, the question as to whether applicant No.1 was lured by applicant No.2 to leave her parental home or that applicant No.1 left her parental home at her own free wish and will cannot be decided at this stage since investigation into the alleged offence is still going on.

4.4 It is pertinent to note that though the complaint was registered on 26.04.2003, applicant No.2 was arrested only on 15.05.2006 i.e. applicant No.2 had remained absconding for a period of about three years. Moreover, during all this time i.e. from the commission of alleged offence till arrest of applicant No.2 by the Police Authority, applicant No.1 had remained with applicant No.2 and that applicant No.2 had also made physical contact with applicant No.1 during the said period. The said fact is admitted by applicant No.1 in her statement. If the said statement of applicant No.1 is believed to be true, then it cannot be said that no offence is made out, since applicant No.1 was neither major nor her marriage with applicant No.2 had taken place, at the relevant time .

4.5 Therefore, reading the complaint as it is and taking into consideration the overall facts and circumstances of the case prima facie it cannot be said that no offence is made out. In view of the above, the decisions relied on by

learned Advocate for the applicants in support of case of the applicants, shall not apply to the case on hand.

5.0 In the result, the application stands dismissed. Rule is discharged. Interim relief, if any, stands vacated.

(K.S. Jhaveri,J.)

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